IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9141 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SURESH HARCHAND SONAR THRO' MOTHER SAKUNTALABEN HARCHAND

Versus

POLICE COMMISSIONER

Appearance:

MR NL PATEL for Petitioner

Mr. U.R. Bhatt, AGP for Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 17/04/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner calls in question the legality and validity of the detention order dated 3rd November 1997 passed by the Police Commissioner for the city of Surat invoking his powers under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act (for short `the Act') pursuant to which the petitioner is arrested and at present kept under detention.

2. In order to appreciate the rival contentions of

the parties necessary facts may in brief be stated. The Police Commissioner for the city of Surat had the information that the petitioner was by his nefarious activities terrorising the people and disturbing the public order. He therefore thought it wise to study the case and pass appropriate order, but on examination of necessary records available before different police stations he could see that about three complaints were lodged with Rander police stations and all the three complaints were of the offences of extortion. As alleged the petitioner went to Ramsukh Chhaganlal Katik on 10th August 1997 and demanded Rs. 10,000/- putting him in fear of instant death or grievous hurt and then extorted Rs. 5,000/-. In another complaint lodged by Sohanlal Gangaram Katik the petitioner putting him in fear of instant death or grievous hurt demanded Rs. 5,000/- and extorted Rs. 1,500/-. As alleged in the third complaint the petitioner went to Rameshchandra Nagindas Shah and demanded Rs. 25,000/-. The Police Commissioner was then shocked to know that the petitioner by coercive measure used to extort money from different people and those who refused to pay or resisted the demand were brutally beaten and had to face dire consequences. The Police Commissioner therefore thought it fit to record the statements of some of the persons but to his utter surprise no one was willing to give statement because every one was apprehending violent attack and serious wrongs being done to them. After considerable persuasion, some of the persons showed their willingness to give the statement about the miseries and woes they were experiencing, but that too after the assurance was given to the effect that their particulars disclosing their identity would not be disclosed. Perusing the statements of the witnesses recorded the Police Commissioner found that antisocial activities disturbing the public order were going berserk and to hold the petitioner in kittle stern action was absolutely necessary. However he found that any action if taken under the general law sounding dull would yield no result and therefore he thought it fit to pass the impugned order exercising his powers under the Act and detain the petitioner. Accordingly the impugned order came to be passed pursuant to which the petitioner is at present kept under detention. By this application he therefore calls in question the legality and validity of the order passed against him.

3. On behalf of the petitioner on several grounds the order in question is assailed, but at the time of submission when query was made, Mr. Bhatt, learned AGP representing the petitioner tapered off his submissions

confining to the only ground namely exercise of privilege under Section 9(2) of the Act. According to him, without any just cause the particulars about the witnesses are suppressed. For want of the particulars the petitioner could not decide what defence was available to him and whether the statements recorded were reliable. His right to make effective representative was thereby jeopardised. Further reading the order it appears that the Commissioner of Police did not apply his mind for his subjective satisfaction about the exercise of privilege. He entrusted the task of enquiry about the fear expressed by the witnesses. He did not personally inquire as to whether the fear expressed by the witnesses was genuine or imaginary. He merely accepted the report made by his Deputy Commissioner of Police, `G' Division, Surat and exercised the discretion. His subjective satisfaction was thus vitiated. The continued detention is therefore illegal. In reply to such contention, Mr. U.R. Bhatt, learned AGP for the respondent submitted that every material placed before the Police Commissioner was considered and after investigation, the Police Commissioner reached the conclusion that in the public interest namely to protect the lives of the witnesses their particulars disclosing their identity were required to be kept secret and when accordingly in public interest the particulars were not supplied the right of the petitioner cannot be said to have been jeopardised.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating nondisclosure overrides the public interest requiring disclosure.

Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, it was incumbent on the Police Commissioner to file the affidavit and satisfy the court that he in the public interest found to be absolutely necessary to suppress the sources and other particulars about the witnesses. In this case, no

affidavit is filed. When that is so, it can be assumed that without any just cause the Police Commissioner has abstained from filing the affidavit. It can therefore be assumed that the particulars suppressed were suppressed without any just cause. The same ought to have been given, but when not given the right of the petitioner to make effective representation was as submitted jeopardised. Reading the order, it becomes clear that the Police Commissioner, Surat had entrusted the task to Deputy Commissioner of Police `G' Division Surat. After inquiry, the Deputy Police Commissioner reported that the fear expressed by the witnesses was genuine. Thereafter the Police Commissioner did not personally applying the mind study the papers and decide whether the privilege should be exercised. He merely accepted the report and exercised the privilege. His subjective satisfaction is therefore vitiated. Under the circumstances, the continued detention must be held to be unconstitutional and illegal and the detention order passed is required to be quashed and set aside.

6. For the aforesaid reason, the application is allowed. The order of detention, being unconstitutional and illegal, is hereby quashed and set aside. The petitioner is hereby ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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(rmr).